STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY

In the Matter of Proposed Permanent Rules Relating to Vehicle Operator Testing and Third-Party Testers, Minnesota Rules Parts 7410.6000 to 7410.6540.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Steve Mihalchick[1] conducted a hearing on these proposed rules beginning at 9:00 a.m. on Tuesday, January 21, 2003, in the training room of the Department of Transportation, Minnesota Administrative Truck Center, 1110 Center Pointe Curve, Mendota Heights, Minnesota. The hearing continued until everyone present had an opportunity to state their views on the proposed rules.

A hearing for agency rulemaking is required when a sufficient number of persons request one.[2] It is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Department of Public Safety (Department) received more than twenty-five written requests for a hearing on its proposed rules, and so convened the hearing. Several employees of the Department were at the hearing, constituting a panel to provide the public with information about the proposed rules and to answer any questions. The panel members were:

- Jane Nelson, rule coordinator for the Division.
- Jim Connolly, program manager for driver examining and license issuing.
- Debra Carlson, exam services coordinator for the Department.
- Jim Nuessle, regional supervisor for the northern Twin Cities suburbs, stationed at the Arden Hills drivers' exam station.
- Don Hoescht, soon to be the driver education coordinator of the Department of Public Safety.
- Dennis Lacina, regional supervisor for the west metro area, stationed in Plymouth.
- Sharon Stoeck, assistant regional supervisor for the south metro, stationed in Eagan.
- Cindy Hom, driver examining and driver education specialist.

Twelve members of the public signed the hearing register.

After the hearing ended, the record remained open for twenty calendar days, until February 10, 2003, to allow interested persons and the Department an opportunity to submit written comments.[3] During this initial comment period the Administrative Law Judge received two written comments, one from the Department of Public Safety and one from Mr. William Collins, from the Interstate Driving Academy. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The deadline for response to the comments was February 18, 2003. Again, the Administrative Law Judge received two written responses -- one from the Department and one from Mr. Collins. The hearing record closed for all purposes on February 18, 2003.

NOTICE

The Department must make this Report available for review for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request. If the Commissioner of Public Safety makes changes in the rules as finally proposed, including those suggested or recommended in this Report, he must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before he may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit the rules to the Revisor of Statutes for a review of their form. After the Revisor of Statutes approves the form of the rules, the rules must be filed with the Secretary of State. On the day of that filing, the Department must give notice to everyone who requested notice of that filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 25, 2001, the Driver and Vehicle Services Division of the Department of Public Safety (DVS) mailed a Request for Comment notice to all parties who registered with the Department for purposes of receiving notices about rule activity under Minn. Stat. § 14.14, subd. 1(a).

2. On October 29, 2001, DVS published a Request for Comment on Possible Rules on this subject in the *State Register* at 26 SR 590. The Request for Comment specifically described the planned rule amendments being considered by DVS.

3. On September 24, 2002, the Department requested that a hearing be scheduled and filed with the Chief Administrative Law Judge a proposed Dual Notice of Hearing, a copy of the proposed rules certified as to form, and a Statement of Need and Reasonableness (SONAR) containing a plan for additional notice. The Department did not request approval of the plan for additional notice. Those documents were transferred to the Administrative Law Judge (ALJ) for review.

4. The Administrative Law Judge approved the Department's proposed Notice of Hearing on September 30, 2002.

5. On December 5, 2002, DVS mailed the Notice to Adopt rules with a copy of the proposed rules attached to all parties on the agency rulemaking list (which includes the Governor's Office) prepared pursuant to Minnesota Statutes, section 14.14, subdivision 1a.

6. On December 5, 2002, the Notice to Adopt rules with a copy of the proposed rules attached was mailed to all deputy registrar offices, licensing agents, and state DVS application and examination sites with a request to post the notice.

7. On December 5, 2002, the Notice to Adopt rules with a copy of the proposed rules attached was mailed to a list of school bus companies, trucking companies, and currently-designated third-party testing programs from lists on file with DVS. DVS asserts that the parties have an interest in this matter because they may be providing skills or road tests on behalf of the agency.

8. As required by Minnesota Statutes, section 14.116, copies of the notice, proposed rule, and Statement of Need and Reasonableness were mailed to the chairs and ranking minority members of the following committees in the Minnesota House of Representatives and Senate: transportation, judiciary, and crime prevention on December 5, 2002.

9. On December 9 , 2002, the Notice to Adopt Rules and the text of the certified proposed rules were published in the State Register at 27 S. R. 806.

10. On January 6, 2003, DVS sent a letter to the Administrative Law Judge, notifying him that the Department would be proceeding with a public hearing, because more than twenty-five comments had been received.

11. At the hearing, the Department introduced the following documents:

(1) Request for Comment published in the State Register Monday, October 29, 2001 at 26 S. R. pages 590 to 591.

(2) Certificate of Agency Rulemaking Mailing List, current as of October 15, 2001 compiled pursuant to Minn. Stat. § 14.14, subd. 1a with a copy of the list attached. The Request for Comment was mailed to all parties on this list.

(3) Certificate dated October 30, 2001 of Providing Notice and mailing of the Request for Comment and Giving Notice as per attached notice plan, dated December 1, 1999.

(4) Letter dated September 24, 2002 to Chief Administrative Law Judge Kenneth Nickolai requesting assignment of an Administrative Law Judge.

(5) A copy of the Proposed Permanent Rules Relating to Vehicle Operator Testing by Third-Party Testers, Chapter 7410, as certified by the Revisor of Statutes.

(6) The DUAL NOTICE: Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or more Persons Request a Hearing, and Notice of Hearing if 25 or more Requests for a hearing are Received, dated October 31, 2002 and signed by Charles R. Weaver, Jr.

(7) A copy of the Statement of Need and Reasonableness, dated October 31, 2002 and signed by Charles R. Weaver, Jr.

(8) Letter dated September 30, 2002 from Administrative Law Judge Richard C. Luis approving the dual notice.

(9) Notice of Intent to Adopt Rules and Proposed Rules as published in the State Register on December 9, 2002 at 27 S. R. pages 806 to 815.

(10) Certificate of Accuracy of Agency Rulemaking Mailing List established pursuant to Minn. Stat. § 14.14, subd. 1a, with a copy of the list of parties to whom the Notice of Intent to Adopt Rules and a copy of the proposed rules were mailed.

(11) List of Third Party Testers to whom the Notice of Intent to Adopt Rules and a copy of the Proposed Rules were mailed. Interested persons to whom notice, rules and Statement of Need and Reasonableness were mailed.

(12) A list of 87 County Sheriffs to whom the Notice of Intent to Adopt Rules and the Proposed Rules were mailed.

(13) A list of members of the Department's Law Enforcement Advisory Committee to whom the Notice of Intent to Adopt Rules and the Proposed Rules were mailed.

(14) Letter dated December 6, 2002 to the Minnesota Chiefs of Police Association enclosing copies of the Dual Notice to Adopt Proposed rules, the proposed rules, and Statement of Need and Reasonableness.

(15) Certificate of Giving Notice Pursuant to the Notice Plan dated January 2, 2003.

(16) Letter dated December 5, 2002 pursuant to Minn. Stat. § 14.116, to ranking majority and minority members of House and Senate Judiciary, Transportation and Crime Prevention committees

indicating proposal of rules and enclosing a copy of the Notice of Intent to Adopt Rules, Proposed Certified Rules, and Statement of Need and Reasonableness.

(17) As required by Minn. Stat. § 14.131 and 14.23, letter dated December 5, 2002 to the Legislative Reference Library enclosing a copy of the Statement of Need and Reasonableness.

1. The Administrative Law Judge finds that the Department has met all of the procedural requirements of applicable statutes and rules.

Background and Nature of the Proposed Rules

13. This rule proposal addresses the delegation of some driver examination testing to parties other than state examiners. The delegation of testing authority to third parties is primarily for commercial trucks and buses requiring a class A, B, or C license, and for motorcycle skills testing of persons eighteen or older. The proposed rules, parts 7410.6000 to 7410.6540, largely formalize existing DVS practice for third-party testing, specifying the criteria for eligibility to be a third-party testing program and the qualifications to be an individual third party tester.

14. The portions of the proposed rules that attracted the most attention and dispute were those that relate to eligibility for third-party testing programs for Commercial Driver's Licenses (CDL).[4] The rules allow private businesses to become a testing program if they employ fifty or more individuals who must have a CDL (e.g., a school bus company). The rules also allow *public* educational institutions to become a testing program if they offer a course in the operation of commercial motor vehicles. However, the rules exclude *private* educational entities that offer a course in the operation of commercial motor vehicles. Under the proposed rules, state-run trucking schools could test their students on-site, whereas private trucking schools would still have to send their students to the local public examination center. Owners of private trucking schools objected to this distinction as giving state-run schools an unfair advantage.

Statutory Authority

15. In its Statement of Need and Reasonableness (SONAR), the Department has sufficiently demonstrated its statutory authority to adopt the proposed rules at issue. Minn. Stat. § 171.13, subd. 1 gives the commissioner authority to examine each applicant for a driver's license "by such agency as the commissioner directs." Subdivision 3 of that statute allows the commissioner to require "an examination by such agency as the commissioner directs of any licensed driver." Regarding delegation of this authority to a third party for commercial license testing, this option is authorized by United States Code of Federal Regulations, title 49, part 383, section 383.75, which states:

Sec. 383.75 Third-party testing.

(a) Third-party tests. A State may authorize a person (including other State, an employer, a private driver training facility or other private institution, or a department, agency or instrumentality of a local government) to administer the skills tests as specified in subparts G and H of this part, if the following conditions are met:

I. The tests given by the third party are the same as those which would otherwise be given by the State; and

II. The third party has an agreement with the State containing, at a minimum, provisions that:

(i) Allow the [Federal Motor Carrier Safety Administration] FMCSA, or its representative, and the State to conduct random examinations, inspections and audits without prior notice;

(ii) Require the State to conduct on-site inspections at least annually;

(iii) Require that all third party examiners meet the same qualification and training standards as State examiners, to the extent necessary to conduct skills tests in compliance with subparts G and H;

(iv) Require that, at least on an annual basis, State employees take the tests actually administered by the third party as if the State employee were a test applicant, or that States test a sample of drivers who were examined by the third party to compare pass/fail results; and

(v) Reserve unto the State the right to take prompt and appropriate remedial action against the third-party testers in the event that the third-party fails to comply with State or Federal standards for the CDL testing program, or with any other terms of the third-party contract.

(b) Proof of testing by a third party. A driver applicant who takes and passes driving tests administered by an authorized third party shall provide evidence to the State licensing agency that he/she has successfully passed the driving tests administered by the third party.[5]

Subparts G. and H. specify the knowledge and skills required of commercial vehicle drivers and the testing standards to measure such knowledge and skills, respectively.

16. Minn. Stat. § 169.74 authorizes the commissioner to administer tests for licensure to operate motorcycles.

17. The Administrative Law Judge finds that the DVS has statutory authority to adopt the proposed rules.

Rulemaking Legal Standards

18. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[6] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[7] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[8] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[9]

18. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is entitled to make choices between possible approaches so long as its choice is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[10]

19. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the agency complied with rule adoption procedures, whether the proposed rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[11]

20. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State, "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."[12]

21. The standards to determine whether changes create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the ... notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood the rulemaking proceeding ... could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the ... notice of hearing," and whether the "effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing."

Impact on Farming Operations

22. Minnesota Statutes, section 14.111, imposes an additional notice requirement when rules are adopted that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change

to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

23. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rules will not affect farming operations in Minnesota, and thus finds that no additional notice is required as a result.

Statutory Requirements for the SONAR

25. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule; and
>
> (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for an reasonableness of each difference.

26. The SONAR includes the analysis performed by the DVS to meet the requirements of the statute.[13]

27. The proposed rules affect persons currently designated as third-party testing programs and third-party testers. The rules affect persons who may want to be designated as a third-party testing program or third-party tester. These include parties giving motorcycle safety courses and skills tests and parties who train and test commercial vehicle operators such as school bus companies, public bus transit authorities, motor carriers, and public post-secondary vocational technical schools.

28. The rules affect individuals who seek a motorcycle endorsement or a commercial driver's license. The rules affect law enforcement officers who must ensure that all persons obey applicable traffic and vehicle laws. The rules affect state examiners

who give state written and road tests and bear responsibility for training, auditing and inspecting third-party testing programs and testers.

29. Finally, the rules affect the general public and any person concerned about the safe operation of motor vehicles on public streets and highways.

30. DVS contends that all of the above persons will benefit from the state administrative rules because they address questions, policy, and procedures that involve the administration of the state law pertaining to the examination of drivers and the outsourcing of that administrative responsibility to private parties.

31. The Department believes that regulated and potentially regulated third parties will benefit from the rules because they will provide consistent and fair administration of DVS policy and procedures with respect to third-party testers .

32. DVS does not perceive any significant increase in costs to any parties as a result of the proposed rules. DVS asserts that any costs to the agency, such as publication of the new rules, are absorbed in current agency appropriations. Any effect on state revenue is negligible because the rules reflect current agency practice.

33. DVS maintains that third-party testing programs meet the demand for testing in a timely manner. However, the number of third-party testers must be limited because of the expense of training and monitoring these testers.

34. DVS asserts that it was not able to identify any less costly or less intrusive methods for administering skills and road tests.

35. The proposed rules are an alternative to the current practice of negotiating numerous individual agreements for third-party testing. DVS sees the current practice as less favorable than the proposed rules because the proposed rules provide a means for various affected parties to have input on the public policy considerations surrounding the issue of third-party testing. The current practice does not.

36. DVS asserts that the costs of regulated industries attempting to comply with the rules should mostly stay the same, because the rules reflect current industry practice. However, the costs could possibly decrease for some school districts who choose to share a third-party tester, as this has not been current agency practice.

37. DVS has demonstrated how the proposed rules conform with the provisions of Code of Federal Regulations, title 49, part 383, section 383.75.[14]

Performance-Based Regulation

38. Minnesota Statutes, section 14.131, requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the

agency in meeting those goals." In this case, the Department performed an analysis on a rule-by-rule basis.

39. The DVS's proposed rules meet the agency's regulatory objectives with "superior achievement" because by specifying in rule the agency's practice as to third-party testing, DVS ensures fair and consistent administration of the law.

40. The Administrative Law Judge finds that DVS has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Analysis of Specific Proposals

41. This Report is limited to the discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that DVS has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

42. The main area of controversy was the determination in the proposed rules that a private entity that trains students may not also test its students.[15] This was particularly controversial because a corresponding public entity may test its students under the proposed rules.

43. An agency's burden in adopting rules is to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[16] DVS asserts that this limitation of third-party testing to public educational institutions is reasonable because of the quality assured by the oversight of the Minnesota state college and university system. Also, because profit is not the only measure of success, public entities are less likely to become "testing mills."[17] Plus, DVS asserts that it has found "the test failure rate for vocational/technical students to be much lower than applicants from private commercial driving schools which would indicate the quality of training received."[18] Further, DVS points to problems had by other states who have expanded third-party testing to the private sector. In particular, Pennsylvania had to cancel nine such programs in 1998 because of irregularities. The cost of re-testing and investigation to that state was over a million dollars.[19]

44. The most vociferous opposition to the new rules came from Mr. William Collins, owner of the Interstate Driving Academy in St. Paul, and his attorney, Mr. James Dunn. They objected to the fact that they were never notified formally and individually of the rule-making process.[20] They objected to the DVS's suggestion that a public institution is more ethical than a private one.[21] They also referred to DVS's statistic on pass/fail rates as a "fabrication,"[22] questioned the success of private third-party testing in other states,[23] and proposed a substitute rule to ensure the quality of a private tester.[24] Finally, they alleged that the distinction between public and private truck driving schools violated rights granted to them under the United States and Minnesota Constitutions.

45. In its response to the comments made at the public hearing, DVS emphasized that it was maintaining the restriction on private, for-profit truck driving schools out of its concern for the integrity of the testing process. It stressed that its limitation is not unique; for example, Wisconsin similarly restricts private driver training schools from third-party testing. [25] As to the pass/fail statistic, DVS responded that the allegation in controversy was derived from an interoffice memorandum from Jan Mattson of the Department to Assistant Attorney General Mike Pahl. DVS admitted that it cannot find the statistics to which Mr. Mattson was referring, and that in any event it misstated the information in his memorandum -- his point was "not so much the pass/fail rates but the amount of training that commercial truck driver training schools are providing" (which is typically dramatically less than public schools).[26] Regarding Constitutional rights, DVS replied that it was not aware of special rights guaranteed to private truck driving schools that are different from those granted to the public in general. DVS also emphasized that no federal or state law requires delegation of the testing authority to any state party -- rather, it is at the discretion of the agency.[27]

46. There is no doubt that to the extent DVS relied upon the non-existent pass/fail statistic in formulating its policy, it acted unreasonably. However, the decision to exclude private driving schools from third-party testing clearly rests on many other pieces of evidence, including other states' practice, fear of testing mills, and oversight of the state educational system. Given the markedly discretionary nature of the agency's power to delegate testing, the evidence upon which DVS relied clearly "connects rationally with the agency's choice of action to be taken."[28] It is found also that the Department's decision to exercise its discretion to exclude private truck driving schools/academies from the class of entities allowed to test applicants for licensure has a rational basis and does not violate the constitutional rights of those establishments.

Unbridled Discretion

47. A proposed rule is impermissible if it delegates unbridled discretion to administrative officers. As the Minnesota Supreme Court held, a law must furnish:

> a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[29]

47. As originally published, part 7410.6520 of the proposed rules, relating to denial, cancellation, or suspension of program or tester certificate, did offend due process by granting the agency unbridled discretion in some areas. However, DVS has made alterations after the hearing, removing any unbridled discretion and thus correcting these defects.

48. Subpart 2 said that "[t]he commissioner reserves the right to cancel the third-party testing program in its entirety ..." This was changed to "The commissioner reserves the right to cancel the delegation of third-party testing ~~program~~ in its entirety or an individual program if a federal audit indicates continuation of the general delegation or individual program will jeopardize the receipt of federal funds or the state's ability to issue commercial driver's licenses ...." The change was made to clarify when the commissioner may have to cancel all third-party testing privileges, and when an individual program's or tester's privileges may be cancelled or suspended.[30]

49. Subpart 4 originally read: "The commissioner may issue a correction order to a third-party tester or program for 30 days to correct a deficiency before it becomes subject to suspension or cancellation."[31] This was changed to, "If an audit by the commissioner identifies a situation that needs correction but does not merit suspension or cancellation, the commissioner may issue a correction order to a third-party tester or program for 30 days to correct a deficiency before ~~it~~ the program or tester becomes subject to suspension or cancellation."[32] This change clarifies when a correction order may be used.

50. Subpart 5 originally read: "The commissioner may cancel the approval of the third-party testing program at anytime with or without cause." The provision clearly allowed unbridled discretion and arbitrary enforcement. This language was withdrawn, and a new proposal was introduced at the hearing to ensure that the agency gives reasons for the denial as well as reasonable notice and an opportunity to request a contested case.[33] These changes were necessary to ensure the agency's action is not arbitrary.

51. All proposed changes to Part 7410.6520 are found to be necessary and reasonable and do not constitute substantial changes.

Substantial Change

52. DVS has modified the third-party rules since the notice of hearing. This is permissible under the APA as long as the modified rule is not "substantially different" from the rule proposed in the notice.[34] The modifications to section 7410.6520 (detailed above) do not render the rule substantially different because they merely strengthen an individual's protection against arbitrary agency action and are clearly "within the scope" of the rules originally proposed.[35]

53. The only other modifications were announced at the hearing. The first was to section 7410.6420, where (D) of subpart 1 ("Third-Party Tester Qualifications") originally read: "within one year before application, have had no driver's license suspensions, revocations, cancellations, or disqualifications." This was changed to: "before the date of application have

maintained continuous valid driving privileges for the past year." This is a minor change for clarification and well "within the scope" of the rules as originally proposed.[36]

54. The other change announced at the hearing was to part 7410.6520, subp. 5 ("Cancellation of program approval"). This section was completely withdrawn because it was redundant to subpart 2 (which was amended, as discussed above). The removal of this section does not amount to a substantial difference from the rules in the original notice. As noted above, the entire rule part was proposed to be modified to provide for proper notice and due process.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Public Safety, Driver and Vehicle Services Division gave proper notice in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.131.

5. The Department has modified the proposed rule since the hearing in ways that do not make the rule substantially different according to Minn. Stat. § 14.05, subd. 2 (b), but which remove from the rule inappropriate unbridled discretion.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed permanent rules relating to vehicle operator testing and third-party testers, Minnesota Rules parts 7410.6000 to 7410.6540, be adopted as finally proposed.

Dated this 20th day of March 2003.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Taped.

Transcript prepared by Jean A. Brennan,
Brennan and Associates.

[1] Judge Mihalchick was substituting for Administrative Law Judge Richard Luis, who is the author of this Report.
[2] Minn. Stat. § 14.25, subd. 1 (hearing required if requested by 25 or more persons).
[3] Minn. Stat. § 14.15, subd. 1.
[4] Proposed Rules Relating to Vehicle Operator Testing and Third-Party Testers, 26 SR 590 (Oct. 29, 2001) (to be codified at Minn. R. parts 7410.6000 to 7410.6540) (hereinafter "Proposed Rules"), parts 7410.6160, 7410.6180.
[5] 49 C.F.R. § 383.75.
[6] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).
[7] Greenhill v. Bailey, 519 F.2d 5, 19 (8th Cir. 1975).
[8] Mammenga, 442 N.W.2d at 789-90; Broen Mem'l Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[9] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.
[10] Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).
[11] Minn. R. part 1400.2100.
[12] Minn. R. part 1400.2240, subp. 8.
[13] MINN. DEP'T OF PUBLIC SAFETY, STATEMENT OF NEED AND REASONABLENESS IN THE MATTER OF PROPOSED PERMANENT RULES RELATING TO VEHICLE OPERATOR TESTING AND THIRD-PARTY TESTERS, MINNESOTA RULES, PARTS 7410.6000 TO 7410.6540 (Oct. 31, 2002) (hereinafter "SONAR"), pp. 8 - 11.
[14] SONAR at 10.
[15] Proposed Rules, parts 7410.6100, subp. 4 and 7410.6180.
[16] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.
[17] "Testing mills" refers to the sale of test passage to members of the general public by a private, for-profit interest under the guise of course instruction.
[18] SONAR at 20.
[19] Id.
[20] Exhibits 31 and 32 are written requests for hearing filed by Mr. Collins and Mr. Dunn, respectively, on December 16 and December 27, 2002. These requests are in response to the Dual Notice for Hearing published in the State Register on December 9, 2002, which announced a deadline of January 8, 2003 for filing requests for hearing. Exhibits 31 and 32 establish that Collins and Dunn had actual notice of the hearing, as does their appearance at the hearing on January 21. Mr. Collins also filed post-hearing comments and responses. This activity, which shows full participation in the statutory process by Collins and Dunn after December 9, 2002, cures any prejudice resulting from a lack of formal, individual written notice.
[21] Transcript, at 49.
[22] Id.
[23] Id. at 72 ff.
[24] Id. At 64.
[25] MINN. DEP'T OF PUBLIC SAFETY, 20-DAY RESPONSES IN THE MATTER OF PROPOSED PERMANENT RULES RELATING TO VEHICLE OPERATOR TESTING AND THIRD-PARTY TESTERS, MINNESOTA RULES, PARTS 7410.6000 TO 7410.6540 (following hearing Jan. 21, 2003) (hereinafter "20-DAY RESPONSES)"), pp. 8 - 11.
[26] Id at 10.
[27] Id. at 3.
[28] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.
[29] Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).
[30] 20-DAY RESPONSES, pp. 5-6.
[31] Id. at 6.
[32] Id.
[33] Id.
[34] Minn. Stat. § 14.04, subd. 2.
[35] Id. (b) (1).
[36] Id.